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20
21 **UNITED STATES DISTRICT COURT**
22 **NORTHERN DISTRICT OF CALIFORNIA**
23 **SAN JOSE DIVISION**

24
25 IN RE: HIGH-TECH EMPLOYEE
26 ANTITRUST LITIGATION
27
28 THIS DOCUMENT RELATES TO:
29
30 ALL ACTIONS

31 Master Docket No. 11-CV-2509-LHK

32 **DEFENDANTS' JOINT RESPONSE TO**
33 **PLAINTIFFS' ADMINISTRATIVE**
34 **MOTION TO SEAL REGARDING**
35 **FILINGS RELATED TO PLAINTIFFS'**
36 **MEMORANDUM OF LAW IN**
37 **SUPPORT OF APPLICATION OF THE**
38 **PER SE STANDARD**

Pursuant to Local Rule 7-11 and 79-5, defendants Adobe Systems, Inc. (“Adobe”), Apple Inc. (“Apple”), Google Inc. (“Google”), Intel Corporation (“Intel”), and Intuit Inc. (“Intuit”) (collectively, “Defendants”) hereby jointly respond to Plaintiffs’ Administrative Motion to Seal Pursuant to Civil Local Rules 7-11 and 79-5(d) and (e) (ECF No. 843). Defendants hereby jointly move to seal redacted portions of Exhibits 5-8, 10, and 2924-2928 to the Declaration of Lisa J. Cisneros In Support of Plaintiffs’ Memorandum of Law In Support of Application of the Per Se Standard (“Cisneros Declaration Exhibits”).

The redacted information has been designated Confidential or Attorneys’ Eyes Only under the Stipulated Protective Order (Modified by the Court) (ECF No. 107). Defendants are concurrently filing proposed redacted versions of the Cisneros Declaration Exhibits, as well as declarations in support of the respective sealing requests and a proposed order listing each document sought to be sealed and the specific support for each request.

I. GOOD CAUSE EXISTS TO SEAL DEFENDANTS’ CONFIDENTIAL INFORMATION IN THE CISNEROS DECLARATION EXHIBITS

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of court documents for, *inter alia*, the protection of “a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit has “carved out an exception to the presumption of access to judicial records for a sealed discovery document [attached] to a nondispositive motion,” where the requesting party shows good cause exists to keep the records under seal. *Navarro v. Eskanos & Adler*, No. C-06 02231, 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal. March 22, 2007) (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (“[A] ‘particularized showing’ under the ‘good cause’ standard of Rule 26(c) will ‘suffice[] to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.’”); *see also Pintos v. Pacific Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009) (“In light of the weaker public interest in nondispositive materials, we apply the ‘good cause’ standard when parties wish to keep them under seal.”).

1 The redacted portions of the materials Defendants seek to seal contain highly confidential
 2 and commercially sensitive information about employee compensation, including Defendants'
 3 compensation data as well as information that reflects Defendants' internal business strategies
 4 related to compensation and internal assessments of their and other employers' competitive
 5 position in the labor market. Defendants also seek to keep under seal materials that reflect
 6 confidential hiring data, which reveal confidential recruiting and hiring strategies, practices, and
 7 policies. Defendants further seek to keep under seal information in business contracts which
 8 reflect internal business strategies, policies, and practices. Defendants designated the foregoing
 9 information "Confidential" or "Attorneys Eyes Only" under the Protective Order.

10 This Court has sealed substantially similar compensation and recruiting information in
 11 this case, including in its recent sealing order dated March 14, 2014. *See Order Granting in Part*
 12 *and Denying in Part Motions to Seal dated March 14, 2014 (ECF No. 730); Order Granting in*
 13 *Part and Denying in Part Motions to Seal dated September 30, 2013 (ECF No. 509).* Moreover,
 14 as each of the Defendants' separately filed declarations demonstrate, Defendants kept the sealed
 15 information confidential and the public disclosure of this information would cause each
 16 Defendant harm by giving third-parties (including individuals responsible for competitive
 17 decision-making) insights into confidential and sensitive aspects of each of the Defendants'
 18 strategies, competitive positions, and business operations, allowing these third-parties to
 19 potentially gain an unfair advantage in dealings with and against each of the Defendants.

20 A portion of the sealed information is employee compensation data. This type of
 21 information is regularly sealed because of its confidential and private nature. *See Renfro v.*
22 Unum, No. 09-2661, 2010 BL 104197 (N.D. Cal. May 10, 2010) (granting a motion to seal
 23 records containing plaintiffs' salary information); *Nettles v. Farmers Ins. Exch., No. C06-5164,*
 24 *2007 WL 858060, at *2, 2007 BL 247444 (W.D. Wash. Mar. 16, 2007)* (holding that salary
 25 review notices for third parties "who have not chosen to have their salary history placed into the
 26 public record" could be sealed.); *EEOC v. Kokh, LLC, No. CIV-07-1043, 2010 U.S. Dist. LEXIS*
 27 *82526, at n.1, 2010 BL 187807 (W.D. Okla. Aug. 09, 2012)* (noting that portions of summary

1 judgment materials were filed under seal because they contained “confidential salary
 2 information.”).

3 Similarly, compensation policies, practices and decisions are routinely subject to a
 4 sealing order. *In re Wells Fargo Loan Processor Overtime Pay Litigation*, No. C 07-01841, at
 5 *16, 2008 U.S. Dist. LEXIS 53616, 2008 BL 123131 (N.D. Cal. June 09, 2008) (noting that a
 6 “compensation policy” was filed under seal); *Hertz Equip. Rental Co. v. Useda*, No. CV-10-
 7 4953, 2010 BL 259718, at *2 (N.D. Cal. Nov. 02, 2010) (granting a temporary restraining order
 8 to enjoin a former employee from using a company’s “confidential and/or trade secret employee
 9 compensation information”).

10 In addition, good cause exists to seal confidential information relating to a company’s
 11 internal business, recruiting or hiring practices, strategies and policies, including confidential
 12 analyses of a company’s market position. *See Fed. R. Civ. Proc. 26(c)(1)(G)* (permitting sealing
 13 of “a trade secret or other confidential research, development, or commercial information”);
 14 *Krieger v. Atheros Commc’ns, Inc.*, Case No. 11-CV-00640, 2011 U.S. Dist. LEXIS 68033 at
 15 *3-4 (N.D. Cal. June 25, 2011) (holding that a company could seal a presentation from its
 16 investment adviser that contained “sensitive and confidential information, including long-term
 17 financial projections, discussions of business strategy, and competitive analyses”); *Network*
 18 *Appliance, Inc. v. Sun Microsystems Inc.*, Case No. C-07-06053, 2010 U.S. Dist. LEXIS 21721,
 19 at *9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s] business
 20 strategies and opportunities that were not widely distributed”); *see also TriQuint Semiconductor,*
 21 *Inc. v. Avago Techns. Ltd.*, Case No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at *9 (D. Ariz.
 22 Dec. 13, 2011) (granting motion to seal “market analysis information,” under “compelling”
 23 reason standard applicable to dispositive motions, including a “spreadsheet tracking information
 24 regarding potentially competitive products,” and other business strategy documents, such as
 25 information relating to “product competitiveness, and market and technological opportunities
 26 and risks”).

27 Moreover, the redacted information constitutes trade secrets, defined as “any formula,
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1 pattern, device or compilation of information which is used in one's business, and which gives
2 him an opportunity to obtain an advantage over competitors who do not know or use it."

3 *Samsung*, 727 F.3d at 1221-22. As evidenced by the accompanying declarations, the information
4 Defendants seek to seal relate to Defendants' internal business practices and strategies used in
5 compensating, recruiting, and hiring employees, as well as the confidential terms of business
6 agreements. This falls plainly within the trade secrets definition. *Id.*; see also *In re Electronic*
7 *Arts, Inc.*, 298 F. App'x. 568, 569-70 (9th Cir. 2008).

8 **II. CONCLUSION**

9 For the foregoing reasons, Defendants respectfully request that this Court order the
10 portions of the Cisneros Declaration Exhibits identified in each Defendant's declaration to be
11 placed under seal. A proposed order granting Defendants' sealing requests is being filed
12 concurrently herewith. Defendants are also concurrently filing on ECF sealed versions of the
13 documents sought to be sealed with highlights indicating the proposed redactions and will submit
14 Chambers Copies of the same.

15 Dated: April 14, 2014 MAYER BROWN LLP
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20 **ATTESTATION:** The filer attests that concurrence in the filing of this document has been obtained from all signatories.

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